interest in protecting consumer privacy and because it is not narrowly tailored to meet that interest

In *Central Hudson,* the Supreme Court established a four-part test for analyzing the constitutionality of a content-based commercial speech regulation: *First*, to warrant any First Amendment protection, the regulated speech must concern lawful activities and not be misleading.[65] ***Second,*** for the regulation to be upheld, the asserted government interest in restricting the speech must be substantial. *Third,* the government must show that its speech restriction directly and materially advances the asserted government interest. *Fourth*, the government must narrowly tailor its restriction to the asserted interest, so that there is a reasonable fit between the two.[66] "[I]f the governmental interest could be served **as** well by a more limited restriction on commercial speech, the excessive restrictions cannot survive."" The third and fourth prongs form the heart of the *Cenfrul Hudson* analysis

The first step of ***Cenfrul Hudson*** requires little discussion. The telemarketing calls that are subject to the Commission's proposed national do-not-call regime seek to offer truthful, non-misleading information about a lawful commercial transaction. (To the extent the calls are fraudulent. they can be regulated without First Amendment objection under federal and state fraud provisions.)

Even assuming that the Commission's asserted interest in residential privacy is considered substantial under the second part of the *Central Hudson* test,[68] the

[65] *See* 447 U.S. at 566; *Virginia State Bd. of Pharmacy* **v.** *Virginia Citizens Consumer Council, Inc.*, **425** U.S. 748, 771 (1976).
[66] *See City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410,416 (1993).
[67] *Central* ***Hudson,*** 447 U.S at 564.
[68] ***See*** *Norice,* para. 1. Although freedom from unwanted solicitations may rise to the level of a substantial state interest when the solicitations arc "pressed with such frequency or vehemence as to intimidate, vex, or harass the recipient," *Edenfield v.* ***tune,*** 507 U.S. 761, 769 (1993), "the government cannot satisfy the

Commission has not met its burden of satisfying parts three and four of the *Central Hudson* analysis - whether the regulation directly and materially advances the government's privacy interest, and whether it is narrowly tailored to further the government's asserted goals."'

A. THE PROPOSED NATIONAL DO-NOT-CALL DATABASE WOULD DISCRIMINATE BETWEEN COMMERCIAL AND NONCOMMERCIAL SPEECH IN VIOLATION OF THE FIRST AMENDMENT.

The Commission states that it is revisiting the question of whether to adopt **a** national do-not-call database due to "[p]ersistent consumer complaints regarding unwanted telephone solicitations."" The Commission's principal concern is the need to protect "consumer privacy."" The proposed database, however, would not protect consumers from all unwanted telephone solicitations because its application is limited to certain commercial calls.[72] Although the national do-not-call database purports to regulate all "telephone solicitations,"[73] the TCPA's definition of "telephone solicitation" excludes calls from nonprofit organizations: "a telephone call or message for the purpose of encouraging the purchase or rental of, or investment in, property, goods, or services, . . . but such term does not include a call or message . . . to any person with whom the caller

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second prong of the *Central Hudson* test by merely asserting a broad interest in privacy." *U.S. West, Inc. v. FCC*, 182 F.3d 1224, 1234-35 (10th Cir. 1999). "When faced with a constitutional challenge, the government bears the responsibility of building a record adequate to clearly articulate and justify the slate interest. . . . It must specify the particular notion of privacy and interest served." *Id.* at 1234-35. The need for the government to make this showing is particularly strong given that we live in an open society in which information is exchanged freely. ***Id.*** at 1235. The Commission has asserted that it has received numerous consumer complainrs about unwanted telephone solicitations. ***See Nolice,*** n. 177. It has not, however, demonstrated that such solicitations are so vexatious or intimidating that their prevention constitutes a substantial state interest.

[69] *See* ***Discover), Network,*** 507 U.S. at 4 16,417 n.13; *Board of Trustees of the State Univ. of N.Y. v. Fox,* 492 U.S. 469,480 (1989).

[70] *Notice,* para. 49.

[71] *Id.* para. 1

[72] *See* ***Id.*** para. 56 ("The Commission has concluded, however, that its regulations under the TCPA apply only to commercial calls.").

has an established business relationship, or . . . by a tax exempt nonprofit organization."[74] The exemption for nonprofit organizations "applies to religious and political organizations that have likewise received **tax** exempt status from the U.S. government" and "extends to telephone solicitations made by telemarketers on behalf of tax-exempt nonprofit organizations."[75]

The national do-not-call database would therefore be fatally underinclusive. It would regulate some commercial calls, but would exempt all noncommercial calls, including solicitations by telemarketers on behalf of nonprofit organizations. The disparate treatment of commercial and noncommercial calls does not withstand First Amendment scrutiny. The Constitution demands a "reasonable fit" between a speech-restrictive regulation and the government's asserted goal,[76] such that the challenged regulation advances the government's interest "in a direct and material way."[77] A fundamental mismatch between the government regulation and its purported goal calls into question the sincerity of the government's proffered justification and raises the specter that the government simply prefers some speakers to others.

Indeed, the Supreme Court struck down a regulation that drew a comparable distinction between commercial and noncommercial speech. In *Discovery Network*, a city ordinance banned commercial newsracks **but** permitted noncommercial newsracks on sidewalks. The Court acknowledged that the city's concerns about the safety and aesthetics of its sidewalks were legitimate. but concluded that those concerns applied equally to commercial and noncommercial newsracks: "all newsracks, regardless of

[73] See *id* paras. 1, 50,
[74] 47 **U.S.C.** § 227(a)(3).
[75] ***Nolice* paras.** 33, 56.
[76] *See Discovery Network*, 507 **U.S.** at 417 n.13

whether they contain commercial or noncommercial publications, are equally at fault."[78] As the Court noted, the banned commercial newsracks were "no greater an eyesore" than the noncommercial newsracks permitted to remain on the city's sidewalks.[79] In the absence of a distinction between the commercial and noncommercial newsracks that related to the city's interests, the Court refused to recognize the city's "bare assertion that the 'low value' of commercial speech" justified the categorical ban on commercial speech.[80] The Court explained that the city placed "too much importance on the distinction between commercial and noncommercial speech," and that "the distinction bears no relationship ***whatsoever*** to the particular interests that the city has asserted. It is therefore an impermissible means of responding to the city's admittedly legitimate interests."[81]

The Court's analysis applies with equal force to the Commission's proposed national do-not-call database. The distinction between commercial and noncommercial telephone calls in the proposed do-not-call database is entirely unrelated to the Commission's core concern of protecting consumer privacy. Like the newsracks in ***Discovery Network,*** all telephone solicitations, regardless of whether they are commercial or noncommercial. "are equally at fault" for intruding upon consumer privacy." The alleged intrusion in the home is the same whether the unwanted solicitation comes from a telemarketer seeking a contribution to a charity **or** from a company offering services Nothing suggests that the Commission believes that the prohibited calls are more invasive of privacy than the non-prohibited calls, and nowhere in the *Notice* does the Commission

[77] *Edenfeld* v. *Fane*, 507 U.S. at 767.
[78] *Discovery Network*, 507 U.S. at 426.
[79] *Id* at 425.
[80] *Id.* at 428.

even purport to justify the regime's distinction between commercial and noncommercial calls on this basis. Nor could it, for the alleged intrusion in the home is the same whether the unwanted solicitation comes from a telemarketer seeking a donation to a charity, a company introducing new services, or a landscaping company offering a special deal for mowing a lawn.

The court reached the same conclusion in *Lysaght v. New Jersey, 837* **F. Supp.** 646 (D.N.J. 1993), in which a federal district court enjoined enforcement of a New Jersey ban (absent the called party's consent) on automated commercial calls. Applying intermediate scrutiny and relying heavily on ***Discovery Network,*** the court held that the government's interest in preserving the privacy of the home, while valid, was not furthered by banning only commercial calls because both commercial and noncommercial calls "equally disrupt residential privacy"[83]; nor was it furthered by prohibiting only prerecorded calls, because such calls threaten the privacy of the home just as much as live calls.[84] The absence of any evidence that the calls subject to the do-not-call list are any more invasive of privacy than noncommercial calls is dispositive of the First Amendment analysis

Moreover, the fact that the national do-not-call database would provide a blanket exemption for all noncommercial calls directly "undermine[s] and counteract[s]" the

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[81] *Id.* at 424 (emphasis in original).
[82] *Id.* at 426.
[83] 837 F. Supp. at 651
[84] ***Id.*** at 653. *See also Perry v* ***Los Angeles Police Dep't,*** 121 F.3d 1365, 1369-70 (9th Cir. 1997) (striking down ordinance regulating only for-profit vendors along boardwalk because there **was** no evidence that they "are any more cumbersoine upon fair competition or free traffic flow that those with nonprofit status"); *Anabell's Ice* ***Cream Corp.*** *v Town of Glocester*, 925 F. Supp. 920, 928-29 (D.R.I. 1996) (striking down on *Discovery* ***Network*** grounds ordinance prohibiting use of outdoor loudspeakers by merchants but not by nonmerchants).

government's interest in protecting consumer privacy from telephone solicitations.[85] Because consumers would continue to receive noncommercial calls, including calls from telemarketers on behalf of nonprofit organizations, there is "little chance" that the national do-not-call database "can directly and materially advance its aim."[86]

The Seventh Circuit's opinion in *Pearson* **v. Edgar,** 153 F.2d 397 (7th Cir. 1998), is directly on point. That case involved an Illinois statute that made it unlawful for a real estate agent to solicit a sale or listing of property from any owner who had indicated a desire not to sell the property. Relying heavily on *Discovery Network*, the Seventh Circuit held that the no-solicitation list at issue was impermissibly underinclusive and thus violated the First Amendment.[87] The Court held, for example, that because "the distinction between real estate solicitation and other types of solicitation is not plausible absent evidence that real estate solicitation poses a particular threat to residential privacy," the speech restriction did not .'reasonably fit" the reason for the restriction.[88] Similarly, in the absence of evidence that the real estate solicitations at issue were particularly invasive, "a mechanism whereby homeowners can reject real estate solicitations but not other kinds of solicitation cannot be said to advance the interest in residential privacy 'in a direct and material way.'"[89] Finally, in light of the Supreme Court's commercial speech cases, the Seventh Circuit disclaimed the ability to "place the

[85] *See Rubin v. Coors Brewing Co.*, 514 U.S. 476, 489 (1995) (striking down ban on disclosure of alcohol content on beer labels where same information was allowed on labels of wines and spirits); **Greater New Orleans** *Broadcasting* **Ass'n,** *Inc. v. United States*, 527 **U.S.** 173, 189-90 (1999) **("GNOBA")** (striking down statute prohibiting advertising of private casino gambling, but allowing advertising of state and Indian tribe gambling, given that "any measure of the effectiveness of the Government's attempt to minimize the social costs of gambling cannot ignore Congress' simultaneous encouragement of tribal casino gambling").
[86] 514 U.S. at 489; *see also Central* **Hudson,** 447 U.S. at 564 ("[T]he regulation may nor be sustained if it provides only ineffective or remote support for the government's purpose.").
[87] 153 F.3d at 402-05.
[88] *Id.* at 404.
[89] *Id* at 404 (quoting *Edenfield*, 507 **U.S.at** 767).

interest in residential privacy above the interest in logical distinctions in speech restrictions.+"'

B. THE PROPOSED NATIONAL DO-NOT-CALL DATABASE WOULD VIOLATE THE FIRST AMENDMENT BECAUSE IT IS MORE EXTENSIVE THAN NECESSARY TO SERVE THE GOVERNMENT'S INTEREST IN CONSUMER PRIVACY.

A restriction on commercial speech may not be "more extensive than necessary to serve the interests that support it.""[90] The government must show that its interests cannot be protected by a more limited regulation of speech,[92] and bears the burden of demonstrating that a regulation has been narrowly tailored to the asserted governmental interest.[93] The Supreme Court has "made clear that if the Government could achieve its interests in a manner that does not restrict speech, or that restricts less speech, the Government must do so."[94] Accordingly, the Court has not hesitated to strike down regulations of commercial speech that were more extensive than necessary to serve the government's asserted interests."

The Commission could implement alternative regimes to protect consumer privacy that would restrict less speech. For example, company-specific do-not-call lists, which protect consumer privacy by requiring telemarketers to place a consumer on the company's list if the consumer asks not to receive further solicitations, strike a better

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[90] *Id* at 404. *See also* R.A.V. v. City of St. Paul, 505 U.S. 377, 382 (1992).
[91] *GNOBA.* 527 U.S. at 188.
[92] *Central Hudson,* 447 U.S. at 570
[93] *GNOBA,* at 183, 188.
[94] *Thompson v. Western States Med. Ctr.*, 122 S.Ct. 1497, 1506 (2002).
[95] *See, e.g., Rubin,* 514 U.S. at 490-91 (holding law prohibiting display of alcohol content on beer labels unconstitutional in part because of availability of less restrictive means of advancing government's interests); *44 Liquormart, Inc. v. Rhode Island,* 517 U.S. 484, 507 (1996) (striking down prohibition on advertising the price of alcoholic beverages in part because "alternative forms of regulation that would not involve any restriction on speech would be more likely to achieve the State's goal of promoting temperance"); *Central Hudson,* 447 U.S. at 570-71 (striking down regulation banning advertising by a utility where "no showing has been made that a more limited restriction on the content of promotional advertising would not serve adequately the State's interest").

balance between consumer privacy and the First Amendment rights of telemarketers. Company-specific lists allow a customer access to information from a variety of sources - including information that the consumer may not have anticipated would interest him - while providing the consumer with an easy mechanism to protect his privacy from unwanted calls. Although the company-specific lists impose a slightly greater burden on the consumer to the extent that the consumer must respond once to each caller (as opposed to responding once by placing his name on the national list), this burden is outweighed by the benefit to the consumer and telemarketer alike of the free exchange of ideas."[96]

Unlike the national do-not-call database, the company-specific lists are narrowly tailored to serve consumer privacy. The national do-not-call database regime paints with too broad a brush. If a consumer receives a telephone solicitation from a local landscaping company and responds by asking to be included on the national do-not-call list. not only will that landscaping company suffer the consequences, but so will every other company that would otherwise call that consumer. In this way, all commercial callers are penalized for the conduct of a single actor, and the First Amendment rights of a wide range of callers are restricted. Such a broad sweep suggests that the Commission has not "carefully calculate[d] the costs and benefits associated with the burden on speech imposed by the regulations."[97] The company-specific lists, by contrast, protect the free speech rights of a company that wishes to disseminate information to a consumer until the consumer makes clear that he does not want to receive information from the

[96] *See, e.g., Central* ***Hudson,*** 447 U.S. at 561-62 ("Commercial expression not only serves Ihe economic interest of the speaker, but also assists consumers and furthers the societal interest in the fullest possible dissemination of information.").

[97] *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 561 (2001) (internal quotation and citation omitted),

company. At the same time, the company-specific lists adequately protect a consumer's privacy because after receiving just one potentially unwanted telephone call, the consumer can prevent all future calls from that company by simply requesting his name be added to the company-specific list

Other alternatives to the national do-not-call database. such as the use of caller identification devices and services that block calls from unlisted telephone numbers, would likewise adequately protect consumer privacy while at the same time preserve the free speech rights of callers

C. THE PROPOSED NATIONAL DO-NOT-CALL DATABASE WOULD VIOLATE THE FIRST AMENDMENT TO THE EXTENT IT WOULD MAKE CONTENT-BASED DISTINCTIONS AMONG TYPES OF COMMERCIAL SPEECH.

Finally, to the extent that the Commission's telemarketing **rules** draw content-based distinctions among types of commercial speech, they are subject to strict scrutiny rather than a *Central Hudson* analysis and are unconstitutional

"Content-based regulations are presumptively invalid."[98] Indeed, "[a]s a general matter, 'the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.'"[99]

In ***R.A V.***, the Supreme Court addressed content-based restrictions within categories of "proscribable speech," such as the commercial speech at issue here.'"[100] The Court noted that "when the basis for the content discrimination consists entirely of the very reason the entire class of speech at issue is proscribable, no significant danger of

[98] *R A.V. v City of St. Paul,* 505 U.S. 377, **382** (1992).
[99] *Consolidated Edison Co. of N.Y. v Pub. Serv. Comm'n.*, 447 **U.S.** *530,* 536 (1980) (quoting ***Police** Department* **v.** *Mosley*, **408** U.S. 92, 95 (1972)).
[100] WorldCom believes that truthful, non-misleading commercial speech is entitled to full First Amendment protection. WorldCom recognizes. however. that although several Justices appear to have embraced that

idea or viewpoint discrimination exists."[101] When the content-based distinctions are *unrelated* to the reason the speech is generally proscribable, however, the Court's oft-noted concerns of the dangers of content-based discrimination remain at the fore.

For example, although a state may choose to prohibit only that obscenity which is "the most patently offensive in its prurience," it may ***not*** prohibit only that obscenity which includes "offensive political messages."[102] In the commercial speech context, that means that although "a State may choose to regulate price advertising in one industry but not in others because the risk of fraud (one of the characteristics of commercial speech that justifies depriving it of full First Amendment protection) is in its view greater there,"[103] a State may not prohibit "only that commercial advertising that depicts men in a demeaning fashion."[104]

Courts' more permissive approach toward regulation of commercial speech has been justified principally on the ground that commercial speech is both "more easily verifiable by its disseminator" and less likely to be "chilled by proper regulation."[105] The regulation of commercial speech, therefore, "is limited to the peculiarly ***commercial*** harms that commercial speech can threaten - *i.e.*, the risk of deceptive or misleading advertising,"[106] and the need to "preserv[e] a fair bargaining process."[107] To the extent

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position, it is not yet received the suppon of a majority of the **Court.** *See generally Lorillard Tobacco Co.. 533* U.S. at 554-55.

[101] ***R.A.V.***, 505 U.S. at 388.

[102] *Id.*

[103] *Id.* at *388-89* (internal citations omitted).

[104] *Id.* at *389;* see *also Lorillard Tobacco Co.*, 533 U.S. at *516* (Thomas, J., concurring) ("[E]ven when speech falls into a category *of* reduced constitutional protection, *the* government may *not* engage in content discrimination for reasons unrelated to those characteristics of the speech that place it within the category."); ***GNOBA,*** *527* U.S. at 193-94 (Thomas, J., concurring) (noting that, even in the commercial speech content. "decisions that select among speakers conveying virtually identical messages are in serious tension with the principles undergirding the First Amendment").

[105] *Virginia State Bd of Pharmacy*, 425 U.S. at *112* n.24; *see also Lorillard Tobacco Co., 533* U.S. at *516* (Thomas, J.. concurring).

[106] *Lorillard Tobacco Co.*, 533 U.S. at 576 (Thomas, J., concurring) (emphasis in original)

that the Commission seeks to draw distinctions among types of commercia1 speech that are "unrelated to the preservation of a fair bargaining process," the distinctions - "like all other content-based regulation of speech - must be subjected to strict scrutiny,"[107] and cannot survive.

III. ADOPTING A NATIONAL DO-NOT CALL DATABASE IN TANDEM WITH THE FTC'S PROPOSAL TO ESTABLISH SUCH A DATABASE WOULD VIOLATE THE REQUIREMENTS OF THE TELEPHONE CONSUMER PROTECTION ACT.

In January of this year, the FTC issued a Notice of Proposed Rulemaking announcing its decision to reexamine its telemarketing regulations, and requesting comment on a proposal *to* establish a national database of consumers who do not wish to receive telemarketing calls.[109] The FTC issued subsequent notices to provide additional detail regarding its proposal, and to seek further comments on the implementation of the proposed scheme.[110] In September 2002, this Commission requested comments regarding, inter alia: the propriety of retaining a company-specific approach if the FTC adopts a national database;[111] the extent to which the FCC may act in conjunction with the FTC to develop a national database;[112] the effect of a combination of efforts between

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[107] *44 Liquormart Inc*, 517 U.S. at, 501 (Stevens, J., concurring, joined by Kennedy and Ginsburg, JJ.); *see also R.A.V.*, 505 U.S. at 388-89 (noting that "risk of fraud" is "one of the characteristics of commercial speech that justifies depriving it of full First Amendment protection"); *Rubin v Coors*, 514 U.S. at 493 (Stevens, J., concurring) (identifying the "rationales for treating commercial speech differently under the First Amendment" as "the importance of avoiding deception and protecting the consumer from inaccurate or incomplete information in a realm in which the accuracy of speech is generally ascertainable by the speaker").

[108] *Lorillard Tobacco Co.*, 533 U.S. at 577 (Thomas, J., concurring); *see also United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 812 (2000); *R.A.V.*, 505 U.S. at 395.

[109] *Telemarketing Sales Rule,* 67 Fed. Reg. 4492 (FTC Jan. 30, 2002) ("FTC NPRM").

[110] *See Privacy Act; System of Records*, 67 Ted. Reg. 8985 (FTC Feb. 27. 2002); *Telemarketing Sales Rule User Fees*, 67 Fed. Reg. 37362 (FTC May 29,2002).

[111] *See Notice*, para., 16.

[112] *See id.* para.. 49.

the FCC and the FTC;[113] the wisdom of extending the FTC standards to companies subject to the FCC's jurisdiction, and the role the FCC should play in administering the database if it does so;"' and any concerns that such collaboration would raise, such as an inconsistency between the requirements of the Telephone Consumer Protection Act and the FTC's proposed rules."'

As discussed in more detail below, FCC coordination with the FTC raises serious statutory concerns. Because the FTC's proposal conflicts with several aspects of the Telephone Consumer Protection Act ("TCPA"),[116] a wholesale adoption of the FTC's proposed rules would be unlawful. Given that some of **the** conflicts are inherent to the FTC's proposed regime, these conflicts cannot be cured by adopting regulations that require only partial compliance with the FTC's rules. The FCC therefore lacks the authority to require carriers subject to its jurisdiction to adhere to the FTC's proposed do-not-call rules.

A. THE FCC CANNOT DELEGATE THE ESTABLISHMENT OF A NATIONAL DATABASE TO THE FTC BECAUSE § 227 REQUIRES THE COMMISSION TO CONSIDER CERTAIN ISSUES ITSELF.

It is a fundamental tenet of administrative law that the FCC lacks the authority to deviate from Congress's statutory commands.[117] In this context, Congress adopted section 227 of the TCPA. which both establishes and constrains the FCC's power to adopt rules governing telephone solicitation. In part, section 227 imposes affirmative

[113] *See* ***id.*** para., 52.
[114] *See id.* para., 55.
[115] *See id.* paras. 56-57.
[116] 47 U.S.C. § 227.
[117] *See, e.g., Lyng* v. *Payne*, 476 U.S. 926,937 (1986); ***Chevron*** *U.S.A. Inc. v. NRDC,* **467** U.S. 837, 842-43 (1984); *Alabama Power Co v United States EPA*. 40 F.3d 450, 454 (D.C. Cir. 1994).

duties upon the FCC in the event that it determines that a national do-not-call list should be established. Specifically,

> [T]he Commission shall--
>
> > **(A)** in developing procedures for gaining access to the database, consider the different needs of tclemarketcrs conducting business on a national, regional. State, or local level;
> >
> > (B) develop a fee schedule or price structure for recouping the cost of such database that recognizes such differences and--
> >
> > > (i) reflect the relative costs of providing a national, regional, State, or local list of phone numbers of subscribers who object to receiving telephone solicitations:
> > >
> > > (ii) reflect the relative costs of providing such lists on paper or electronic media; and
> > >
> > > (iii) not place an unreasonable financial burden on small businesses; and
> >
> > (C) consider (i) whether the needs of telemarketers operating on a local basis could be met through special markings of area white pages directories, and (ii) if such directories are needed as an adjunct to database lists prepared by area code and local exchange prefix.[118]

These provisions expressly require the FCC to conduct an independent inquiry into the cnumerated factors when adopting a national do-not-call list, and do not permit the FCC to delegate fulfillment of that duty to the FTC. Congress has determined that the FCC must consider those issues, and issuing regulations that require carriers subject to the FCC's jurisdiction to adhere to the FTC's rules would not be sufficient to meet those requirements -- even if the FTC itself had evaluated the same or similar factors. This is particularly true given that the FTC's proposed rules have not yet been established, and the Commission cannot, therefore, effectively evaluate the effect that adopting identical rules would have on telemarketers operating in different venues. Thus the Commission

[118] 47 U.S.C. § 227(c)(4).

cannot require companies subject to its jurisdiction to adhere to FTC do-not-call regulations unless, at a minimum, it issues an NPRM specifically seeking comment on whether and how the FTC's final rules, once those rules are adopted, meet the requirements of section 227,

B. THE FCC CANNOT ADOPT THE FTC'S PROPOSED RULES BECAUSE THEY DO NOT MEET THE SUBSTANTIVE REQUIREMENTS OF SECTION 227.

Even if the FCC were able to conduct the analysis required by §227(c)(4) at this time, it could not adopt the FTC's proposed rules because those rules conflict with several of the substantive requirements of section 227

First, the FTC's proposed rules cover entities on the national do-not-call database that are expressly excluded by section 227. This Commission may establish a national database "to compile a list of telephone numbers of residential subscribers who object to receiving telephone solicitations, and to make that compiled list and parts thereof available for purchase.""[119] The FTC. in contrast, has proposed rules that are not limited to 'residential subscribers,' but instead sweep more broadly, including outbound telemarketing calls to any "person" who has indicated a desire to be included in the national database (or has expressed a desire not to receive calls from the specific telemarketer).[120] "Person" is defined as "any individual, group, unincorporated association, limited or general partnership, corporation, or other business entity."[121] Thus. on their face the FTC's rules go well beyond those this Commission is authorized to adopt. And although the FTC's proposed rules do exempt some forms of business-to-

[119] 47 U.S.C. § 227(c)(3) (emphasis added).
[120] *FTC NPRM*, 67 Fed. Reg. ai 4543 (§310.4(b)(iii)).
[121] *Id.* at 4541 (§ 310.2(u)).

business telemarketing,[122] this partial exemption of calls does not remove all non-residential subscribers from those requirements. Thus, adopting the FTC's proposed rule would exceed the restrictions that section 227 places upon the FCC's authority to regulate telemarketing because it would require companies subject to the FCC's jurisdiction to refrain from making telephone solicitations to businesses and other non-residential telephone subscribers

The Commission cannot reconcile this conflict between the FTC's proposed rules and section 227 by simply directing the companies subject to its jurisdiction to refrain from calling only the residential subscribers whose names appear in the FTC database, because there would be no practical means of making such a distinction. The NPA-NXXs assigned to a phone number do not themselves indicate whether a telephone number is that of a residential subscriber or a business. Nor has the FTC proposed to include such data with the numbers that are stored in its database.[123] Indeed the FTC has not even explained how potential telemarketers could identify business subscribers in order to comply with its own limited exception for business-to-business calls Accordingly, so long as the FTC's proposed rules continue to include both residential and non-residential callers in the do-not-call database, the FCC may not lawfully require entities subject to its jurisdiction to use that database

Adopting the FTC's proposed rules would also unlawfully inject the FCC into the regulation of companies' telephone solicitations of customers with whom the caller has

[122] *See* 67 Fed. Reg. at 4544 (§ 310.6(g)) (exempting "[t]elephone calls between a telemarketer and any business, except calls to induce a charitable contribution, and those involving the sale of Internet services, Web services, or the retail sale of nondurable office or cleaning supplies").

[123] Although the FTC has not yet determined what information would be included in the database, it has only mentioned telephone numbers, the date and time the number was placed on the registry, telemarketing preferences. and other identifying information such as residential zip codes. ***See*** *Privacy Act; System of Records*, 67 Fed. Reg. at 8986.

an "established business relationship."[124] Congress has determined that calls to a person with whom the caller has such a relationship should not be considered "telephone solicitation,"[125] and therefore are not subject to the restrictions the TCPA or its implementing regulations place on such solicitations The FTC, in contrast, has expressly declined to adopt such an exception to its do-not-call rules.[126] The FCC plainly lacks the authority to adopt this aspect of the FTC's proposed rule, and could only lawfully participate in the FTC's do-not-call database if it expressly authorized callers to make this category of calls.

The FTC's proposed rules are also inconsistent with the specific requirements that Congress enumerated in section 227(c)(3). As the Commission recognized in its NPRM,[127] that provision establishes twelve criteria that must be met by any regulations the Commission adopts to establish a national do-not-call database. The FTC's proposed rule fails to meet several of those criteria, and therefore cannot be adopted by the FCC.

For example, the FTC's proposed rules violate section 227(c)(3)(K), which requires any Commission rule adopting a national do-not-call list to "prohibit the use of such database for any purpose other than compliance with the requirements of this section and any such State law. . . ."[128] Businesses' and telemarketers' use of the database to comply with the FTC's regulations would violate this section because use of the database for compliance with the requirements of another federal agency's rules do not arise under § 227. Because the same would be true of any national database created pursuant to a

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[124] 47 U.S.C. §227(a)(3).
[125] *See id*
[126] See *FTC NPRM*, 67 Fed. Reg. at 4532 (reaffirming previous rejection of proposed exception for "telephone calls made to any person with whom the caller has a prior or established business or personal relationship").
[117] See *Notice*, para., 53.
[128] 47 U.S.C. § 227(c)(3)(K).

separate federal statutory and/or regulatory regime, there is no lawful means for the FCC to share a national database with the FTC. Moreover, the FTC has since proposed to use the national database that it establishes for "certain 'routine uses' that are generally applicable to other FTC records system. . . [such as] in law enforcement investigations or proceedings conducted by the Commission or by other agencies or authorities (e.g., to determine whether a telemarketer is complying with the do-not-call provision of the FTC's Telemarketing Sales Rule), as well as other regulatory or compliance matters or proceedings."[129] Such uses present an equally glaring conflict with the requirements of § 227(c)(3)(K).

The FTC's NPRM also fails to satisfy other requirements of § 227(c)(3), but full analysis is premature since the FTC's rules are not final. Nonetheless, the FCC should decline to act in conjunction with the FTC to establish a single do-not-call database. Not only does the current NPRM fail to meet the procedural requirements of section 227, irreconcilable differences exist between the FTC's proposed rules and the Congressional commands found in section 227.

IV. A NATIONAL DO-NOT-CALL REGIME POSES AN UNDUE BURDEN ON COMMON CARRIERS

The TCPA states that "[i]f the Commission determines to require [a national do-not-call] database, such regulation shall … require each common carrier providing telephone exchange service, in accordance with regulations presubscribed by the Commission, to inform subscribers for telephone exchange service of the opportunity to provide notification, in accordance with regulations established under this paragraph, that

[129] *Privacy Act; System of Records*, 67 Fed. Reg. at 8986.

such subscriber objects to receiving telephone solicitations."[130] The Commission seeks comment on the codification of this provision.'" The requirement to provide such notification has the potential for being exceedingly costly to carriers. These costs will utlimately be borne by telephone subscribers and must be considered in the Commission's evaluation of whether the costs of NDNC outweigh the benefits. If the Commission were to adopt a NDNC database and implement this provision, in order to reduce the costs the Commission should only require carriers to provide a one-time notification to current subscribers. Notification to future subscribers will be unnecessary because their previous carrier would already have notified those subscribers.

The TCPA also states that "[i]f the Commission determines to require [a national do-not-call] database. such regulation shall...require each common carrier providing services to any person for the purpose of making telephone solicitations to notify such person of the requirements of this section and the regulations thereunder."[132] Carriers are not usually aware of a subscriber's intended use of its service. Such notification could be infeasible or extremely costly. The practicality of this provision should be a factor in the Commission's decision as to whether or not to adopt NDNC pursuant to the TCPA. The Commission should also seek comment on the implementation of this provision

THE COMMISSION SHOULD RETAIN, BUT SLIGHTLY MODIFY, ITS CURRENT TCPA RULES

The Commission seeks comment on the effectiveness, or need for modification, of its current rules implementing the TCPA. As noted previously, WorldCom supports

[130] 47 U.S.C. 227(c)(3)(B).
[131] *Nolice.* para. 54.
[132] 47 U.S.C. 227 (c)(3)(L).

the comments being filed today by DMA with regard to these issues.[133] WorldCom hereby provides additional comments on the effectiveness of company-specific lists, the benefits of predictive dialers, and suggestions and concerns regarding he proposed regulations on the use of predictive dialers.

WorldCom also explains why the industry is unable at this time to assess, or address, the impact that number portability and number pooling may have on the capabilities of telemarketers to identify wireless numbers in order to comply with the TCPA.

1. COMPANY-SPECIFIC LISTS ARE THE MOST APPROPRIATE MEANS OF PROTECTING CONSUMERS FROM UNWANTED TELEPHONE SOLICITATIONS.

Company-specific do-not-call lists offer consumers an effective mechansim to stop unwanted telephone solicitations and offer significant advantages over NDNC to both consumers and telemarketers. Company-specific do-not-call regulations allow consumers *to* learn of new service offerings or price reductions they may not have anticipated, while protecting them from undesired repeat calls from a company. **A** message cannot truly be deemed unwanted until it is received and rejected at least once. Although consumers may say they object to telephone solicitations in general, consumers' actions speak louder than words. The fact that one half of households

[133] As addressed in the introduction, WorldCom generally supports **DMA's** comments with regard to predictive dialers, with the exception of the DMA's proposed standard **on** the abandonment rate. Specifically, WorldCom does not agree that a standard below 5% is reasonable, nor should the Commission limit the time period, at least not to a per month or **a** per day standard, for measuring the standard. See *supra*, n.6 and *infra*, pp. 43-45.

surveyed purchased a product or service over the phone in the last year demonstrates that consumers respond favorably and benefit from telephone solicitations.[134]

Company-specific do-not-call lists also allow consumers to pick and choose the companies from which they wish to receive telephone solicitations. The fact that consumers appreciate the ability to pick and choose the entities that contact them is demonstrated by a recent survey. The majority of respondents said that they rarely, never, or from "time to time" requested individual organizations not to call them at home.[135]

A company has a strong incentive, in addition to regulatory compliance, not to telemarket a consumer that has specifically stated that she did not want to receive telephone solicitations from it. For one, it preserves resources for solicitations to those individuals that are more apt to respond favorably to the solicitation. Second, companies are also aware that ignoring a consumer's request could foreclose future business opportunities with that consumer.[136]

As such, MCI takes great measures to ensure that consumers who specifically express a desire not to be called by MCI are not called by MCI. In addition to making verbal requests during a sales call, consumers can place their names and numbers on MCI's do-not-call list by emailing MCI's Customer Service or by calling Customer Service via a toll free number.[137] MCI sales representatives honor those requests using a simple systematic process. MCI also provides thorough, annual training to its

[134] *Supra*, n. 24.
[135] IPI Report, p. 4.
[136] *See* Craves, para. 8-9.
[137] *Id.* Additionally, the Commission seeks comment on whether companies should be required to provide some means of confirmation so consumers may verify that their requests have been processed. *Notice*, para. 17. First. the record does not demonstrate that company-specific do-nor-call requests are being ignored. Second, there would be substantial costs associated with such a requirement. Third, such a requirement would likely cause annoyance to consumers who requested no further contact from the company by any vehicle.

telemarketers on compliance with do-not-call regulations and company policies and maintains a written policy as required by the TCPA.[138]

Company-specific lists also are better for consumers than NDNC because fulfillment of requests to be placed on such lists is faster than with NDNC. Experience in the states demonstrates that it can be months between when the consumer signs-up for the state do-not-call list and the required compliance by companies. Company-specific requests can be honored far more quickly. Do-not-call requests made to directly to MCI are implemented in at most two weeks, and often within twenty-four hours.[139]

With regard to the Commission's regulations concerning company-specific do-not-call lists, WorldCom would, however, like to take the opportunity to strongly urge the Commission to revisit its rules regarding how long a listing must be retained on the company's do-not-call list. The tremendous turnover in telephone numbers means the lists become quickly outdated.[140] Consequently, consumers who never requested to be placed on a particular company's do-not-call call list are being denied a potentially valuable contact by that company. Moreover, telecommunications markets are evolving and expanding rapidly. Companies are continuously offering new and innovative products and services never dreamed of by consumers. Ten years is therefore far too long a time to deny a consumer information on a company's progress on new offerings

WorldCom suggests the required retention period should be no more than five years. Marketers should also be permitted to cross-reference numbers with the Postal Service's National Change of Address (NCOA) system and other data sources to verify that a number has not been reassigned.

[138] *See* Graves, para 8.
[139] *Id*, para 11.

II. THE REGULATION OF PREDICTIVE DIALERS IS NOT NEEDED AT THIS TIME, BUT IF REGULATED, IT SHOULD BE IN A MANNER THAT DOES NOT, IN EFFECT, BAN THE USE OR ELIMINATE THE BENEFIT OF PREDICTIVE DIALERS.

A predictive dialer is customer premise equipment that is attached to the Automatic Call Distributor (ACD)[141] and used to initiate the dialing of pre-determined telephone numbers in a manner that makes efficient use of the sales associates' time. The dialer equipment typically includes software, known as answering machine detection (AMD), which detects when a call is received by an answering machine rather than a "live" person.[142] MCI uses predictive dialers in all of its telemarketing call centers located in various states.[143]

Predictive dialers are a critical marketing tool because 86% to 89% of all outbound dialing does not reach an actual person. Instead, the vast majority of calls are not answered, the line is busy. it reaches a voice messaging service, or an answering machine picks up the call.[144] Predictive dialers enable callers to conserve resources and to target its personnel to calls where a person has actually been reached. The AMD component of predictive dialers itself has a substantial positive impact on productivity, since over one-third of outbound calls are picked up by answering machines.[145]

Additionally, predictive dialers reduce the risk of human error in dialing. In particular, predictive dialers assist companies in ensuring that the telephone numbers on its company-specific do-not-call list, or other prohibited numbers, are not dialed. Before loading the numbers into the equipment, MCJ runs the numbers against its suppression

[140] *Supra* p. 17, n. 53.
[141] ACD is the telephony switching system the routes the calls to the available representatives
[142] *See* Exhibit C, Declaration of Randy Hicks on behalf of WorldCom, Inc.
[143] Hicks. para. 4.

files, which includes company-specific do not call numbers and other numbers that should not to be called. If a number is not to be called, it **will** not be loaded into the system and therefore will not be called.[146] Further, dialers provide a method of controlling the quality and accuracy of the calls being made. The system tracks which tclemarketer handled which call, allowing for future coaching and training. This is exceedingly important in maintaining regulatory compliance for a company that employs thousands of telemarketers. The dramatic reduction in casts and enhanced regulatory compliance capabilities resulting from the use of predictive dialers are highly beneficial to consumers, telemarketers, and regulators

Cognizant of the benefits of predictive dialers, the Commission is concerned with the harm to consumers as a result of the potential for abandon calls and "dead air" posed by this technology."' An "abandoned call" is a call that is disconnected by the equipment after a "live" person has answered the call because no calling party agent is available to handle the call.[148] "Dead Air" is the few seconds of silence a called party may experience as the call is being transferred to the calling party's agent.[149] The Commission seeks recommendations on what approaches it might consider to minimize any harm caused by the use of predictive dialers.[150] Specifically, the Commission seeks comment on whether requiring a maximum setting for the abandonment rate on

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[144] *Id.*
[145] *Id.*
[146] *Id.*, para. 3.
[147] *Notice*, paras. 26-7.
[148] I licks, para. 7. *See also, Notice*, para. 27
[149] *See* ***Norice,*** para. ***21.***
[150] There is no material evidence of substantial consumer harm to justify regulation by the Cornmission. The Commission reports receiving 1,500 *inquiries* in a recent eighteen-month period and 16,000 hits to the Commission's consumer alert website on predictive dialers. *Nolice,* para. 26. Inquiries regarding a new technology do not necessarily indicate that consumers are harmed by that technology, nor do hits to a particular Commission website. In fact, the information the Commission provides on its website may be effectively alleviating any consumer concern that may exist as a result of the use of predictive dialers.

predictive dialers or requiring telemarketers who use predictive dialers to also transmit caller ID information are feasible options for telemarketers."'

As discussed Exhibit C, any regulation that significantly restricts or bans the use of predictive dialers will substantially increase sales costs, costs which **will** ultimately be borne by consumers and harm competition."' Moreover, regulation of the use predictive dialers by those engaging telephone solicitations will not completely eliminate abandoned calls, "dead air," or consumer's concern with unidentified calls.[153] Entities and uses that are not be subject to the Commission's regulations, such as non-profits or uses for surveys. would mean that unregulated use of predictive dialers would continue and contribute to the volume of incoming, and possibly, abandoned calls. Moreover, people are exposed to "abandoned calls" or "dead air" unrelated to the use of predictive dialer. e.g., as a result of someone dialing a wrong number. Tfthese persons or entities have unlisted numbers or block their numbers before making their calls, and possibly if they are calling from out of the calling area, their number will likewise not register on caller ID devices

The Commission should not impose regulations that have the potential of foreclosing the use of predictive dialers. Rather, if the record demonstrates a need, the Commission should adopt regulations that prevent the use of predictive dialers in a manner that is heedless of the number of abandoned calls generated.

A. THE ESTABLISHMENT OF TOO LOW AN ABANDONMENT RATE COULD ELIMINATE ALL OF THE BENEFITS FROM THE USE OF PREDICTIVE DIALERS

[151] ***Norice,*** para. 26.
[152] *Supra*, n. 141
[153] See ***Norice,*** para. 15.

The abandonment rate is determined by the number of abandoned calls versus the total number of "live" person's reached.[154] If the Commission determines it should establish a maximum setting on the abandonment rate, the rate should be at a level that will prevent demonstrated misuse of the equipment by careless users, not one that will eliminate all the benefits the equipment provides. The feasibility of both retaining the benefit of predictive dialers and complying with a mandated maximum abandonment rate depends on the level at which the rate is set, as well as any criteria established for the calculation of that rate. Since numerous factors interplay in the calculus of an abandonment rate, the Commission should not adopt a mandatory maximum abandonment rate without seeking comment on a specific proposal.

WorldCom has determined that its 3-5% abandonment rate is the lowest feasible rate possible in order to obtain the productivity benefits of predictive dialers. **As** discussed in Exhibit C, WorldCom has performed controlled tests in an effort to decrease its current abandonment rate of approximately 3-5% to reach a 1% abandonment rate. The testing indicated that in order to reduce the abandonment rate to this level the predictive dialing system had to be aborted. This meant moving to an auto dialer mode, which reduced productivity by approximately 50%. Moreover the test determined that the 1% goal was not attainable even in the auto dial mode. This is a substantial decrease in productivity relative to the respective minimal decrease in number of potential abandon calls.[155] Consequently, if the Commission were to set a maximum abandonment rate, that rate should not he below 5%

[154] Hicks, para. 7.
[155] **Hicks,** para. 8.

Moreover, the Commission should afford reasonable flexibility to users of predictive dialers in determining the time period over which the abandonment rate will be calculated. Calculating the rate over a six-month period rather than on per month or per day period, for example, does not increase the risk to any individual consumer of receiving an abandoned call. But such flexibility does provide companies pliability in structuring their marketing campaigns, and may assist in compliance and enforcement efforts

B. REQUIRING THE TRANSMISSION OF CALLER ID AS A CONDITION OF PREDICTIVE DIALER USE IS A POTENTIAL BAN ON THE USE OF PREDICTIVE DIALERS.

Requiring the transmission of caller ID information as a precondition to use of predictive dialers could, in effect, be a ban on predictive dialers.[156] Most, if not all, telemarketing centers are currently technically unable to transmit caller ID information In order to accommodate such a condition, most companies would have to upgrade their current switches and circuits, at considerable expense and time. Yet, the transmission of caller ID information by a company engaging in telemarketing does not guarantee that the common carriers carrying the traffic, or the carrier terminating the traffic to the end-user, will be able to continue the transmission of this information to the end-user.[157] This would mean the called party might still receive an unidentified message like "out of area."

[156] The Commission asks whether an abandon call violates the Commission's current rules regarding identification of the caller, specifically 47 C.F.R. §64.1200(d). *Notice*, para. 29. 47 C.F.R. § 64.1200(d) refers to telephone messages. In an abandoned call there is no message and therefore no violation of the Commission's rule.

[157] For one, caller ID is contingent on the use of Signal System 7 (SS7), which is not ubiquitous throughout the country. The terminating carrier would also need to have the telemarketer listed in its database in order *to* send the telemarketers name.

Before considering such a mandate the Commission should specifically seek comment on the costs and time associated with the implementation of such a mandate. The Commission should also seek comment on the ubiquity and availability of Caller ID subscription to determine the potential extent of consumer impact.[158]

III. IT IS PREMATURE TO ASSESS, OR ADDRESS, THE IMPACT THAT NUMBER PORTABILITY AND NUMBER POOLING MAY HAVE ON THE CAPABILITIES OF TELEMARKETERS TO IDENTIFY WIRELESS NUMBERS IN ORDER TO COMPLY WITH THE TCPA.

WorldCom is unaware of any technological tools that would allow telemarketers to recognize numbers that have been ported from wireline to wireless phones or to recognize wireless numbers that have been assigned from a pool of numbers that formerly were all wireline. Nonetheless, the Commission should take no immediate steps to address the impacts of number portability and number pooling on the capabilities of telemarketers to identify wireless numbers in order to comply with the TCPA. These events could have little to no impact on the capabilities of telemarketers. Alternatively, they could have a significant impact. The Commission should wait to see if there is a significant impact before it considers whether to require that the industry and telemarketers undertake potentially costly steps to avoid what might be a very small problem

Until wireless carriers actually begin to participate in number pooling and number portability, it is difficult to assess whether those activities will have a significant impact on the ability of telemarketers to identify wireless numbers in order to comply with the TCPA. For example, it is possible that when wireless carriers participate in pooling, they

[158] Furthermore, since the Commission's rules generally allow callers to **block** the transmission of caller ID information, a mandate thar telemarketers transmit caller ID information raises constitutional concerns. *See*

will prefer to receive pooled blocks that were originally donated by other wireless carriers rather than by wireline carriers. There are a couple of reasons why this could turn out to be the case. First. wireless carriers may establish rate areas that are larger than the rate areas established by wireline carriers. If this is the case, wireless carriers will participate in unique pools that do not include wireline carriers. Second, wireless carriers may serve local calling areas that are substantially larger than those served by wireline carriers. In this circumstance, acceptance of a block donated by a wireline carrier could create serious intercarrier compensation issues for the wireless carrier.

The Commission should ask its expert advisory group, the North American Numbering Council (NANC) to assess the impact of number pooling on the ability of telemarketers to identify wireless numbers. The NANC, working with the North American Numbering Plan Administrator and the Pooling Administrator, could gather information on the extent to which wireless carriers actually receive number blocks from NXX codes that were originally assigned to wireline carriers. If it turns out that such activity is common, the Commission could determine whether there is a low cost way for the Pooling Administrator to assist telemarketers in obtaining accurate information on the assignment of "wireline" blocks to wireless carriers

The impact of number portability on telemarketers is even more speculative than the impact of number pooling. At this time, it is not at all clear when, or even if wireline numbers will ever be ported in any significant volumes to wireless carriers. The Commission has repeatedly delayed implementation of wireless number portability. If one thing is likely, it is that wireless carriers will seek further delay. Moreover, even if wircless carriers do implement number portability, it remains to be seen whether any

supra, pp. 26-30.

significant amount of wireline-wireless porting will occur. There are significant unresolved issues associated with wireline to wireless porting. For example, wireless carriers have indicated that porting intervals on the wireline side are too long and would not be acceptable lo wireless customers, who expect their number to be activated almost immediately. Until wireless carriers actually implement portability and the industry gains experience in the feasibility and popularity of wireline to wireless porting, it would be premature to require the implementation of potentially costly steps

CONCLUSION

The Commission should refrain from adopting a national do-not-call regime and should retain, with some modification as discussed above, the current rules implementing the TCPA.

Respectfully submitted,

WORLDCOM, Inc.

Karen Reidy

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December 9,2002

Its Attorney

Certificate of Service

I. Lonzena Rogers, do hereby certify, that on this ninth day of December, 2002, I have caused a true and correct copy of WorldCom, Inc. Comments in the matter of CG Docket No. 02-278 to be served by hand delivery on the following:

Marlene H. Dortch
Secretary
Federal Communications Commission
445 Twelfth Street, SW
Washington, DC 20554

Kim **A.** Johnson
OMB Desk Officer
725 Seventeenth Street, NW
Room I0236 NEOB
Washington, DC 20503

Les Smith
Federal Communications Commission
445 Twelfth Street, SW
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Washington, DC 20554

Qualex International
Portals I1
Federal Communications Commission
445 Twelfth Street, SW
Room CY-B402
Washington, DC 20554

Lonzena Rogers

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Rules and Regulations Implementing the	)	CG Docket No. 02-278
Telephone Consumer Protection Act	)	CC Docket No. 92-90
of 1991	)	

DECLARATION OF ANDREW M. GRAVES ON BEHALF OF WORLDCOM, INC.

Based on my personal knowledge and on information learned in the course of my business duties, I, Andrew Graves, declare as follows:

1. My name is Andrew M. Graves. I am employed by MCI WorldCom Communications, Inc., ("MCI") a wholly owned subsidiary of WorldCom, Inc., as Senior Manager of Marketing Strategy and Policy for the MCI Group. My business address is 22001 Loudoun County Parkway, Ashburn, VA 20147. I have ten years experience in the telecommunications field, having held Finance and Product Marketing positions, with MCI WorldCom or its predecessor company, MCI Telecommunications Corporation Currently one of my primary functions is overseeing MCI's compliance with regulations related to the marketing of our local and long distance services to residential consumers

2. The purpose of my declaration is to describe the substantial benefits of telemarketing in generating telecommunications sales and assisting telecommunications buyers. I also discuss the negative impact state do-not-call lists have had on MCI's ability to compete and introduce new competitive service offerings to telecommunications consumers. Finally, I discuss why company-specific do-not-call lists are a more appropriate means for allowing consumers to prevent unwanted telephone solicitations to their homes.

BACKGROUND

3. MCI was built, and endures, by bringing competitive and new telecommunications services to consumers across the country. In the long distance market, available prices are lower than ever before and consumers have increased options with regard to their services. Now, in many regions of the country, competition is delivering lower prices, product innovation and better service to consumer of local telecommunications services. Consumer reaction to local competition is extremely favorable. Four years since launching a competitive local product in New York, MCI has acquired 2.4 million subscribers across forty states plus the District of Columbia. In April 2002, MCI introduced The Neighborhood, an innovative all-distance telecommunications product that combines a special feature package with unlimited local and long distance calling for one price. Astoundingly, MCI welcomed half a million customers to The Neighborhood in just 8 weeks after launch, hitting the 1 million customer mark just **24** weeks after launch

BENEFITS OF TELEMARKETING TO TELECOMMUNICATIONS SALES AND CONSUMERS

4. I'he Neighborhood would not have been so phenomenally successful without MCI's telemarketing capabilities. Telemarketing is responsible for the majority of the Neighborhood sales. It is also responsible for the majority of MCI's telecommunications sales in general. MCI's experience demonstrates that telemarketing is the most effective way to introduce new products and services to the public, especially local and long distance telecommunications services, and acquire customers from incumbent providers.

5. Consumers are accustomed to making telephone service decisions in response to telephone solicitations. This is because telemarketing has proven instrumental in

describing complex service offerings to consumers. This is important because telecommunications service offerings are designed to allow customers to customize their service to their specific calling needs. Telecommunication products vary greatly, offering customers a choice of one or a combination of the following services: InterLATA Long Distance, IntraLATA Toll, Local Line, Calling Card and International. For these services, customers can pick and choose a variety of rates and plans that specifically address their needs, including: unlimited local and long distance calling; reduced interstate, instate, card and/or international rates; local features and billing method. These can be extremely complex choices that are most effectively explained through direct communication with the customer. MCI employs thousands of well-trained telemarketers to accomplish this task.

THE EFFECTS OF STATE DO-NOT-CALL LISTS HAVE HAD ON COMPETITION

6. State do-not-call lists have substantially impacted MCI's ability to compete by raising our costs of marketing lower-priced competitive offers to residential consumers. These lists have also hindered the expansion of local competition by restricting our ability to introduce our new products and services to those consumers who might not otherwise learn of these competitive choices, Thus, state do-not-call lists mean that some customers might never learn that they have a choice for local phone service, killing local competition before it even takes hold

7. MCI performed an analysis of three pairs of states, each pair containing one state governed by a state do-not-call list and the other not governed by such a list, in order to assess the impact of state do-not-call lists local market penetration. The pairs were matched based on a similar population and launch date to reduce other irrelevant

factors. MCI found that its local market penetration was significantly higher in the states not governed by a state do-not-call list. up to 60% higher. MCI's assessment is that the variance is substantially the result of the reduced number of households MCI contacted in certain states due to the exclusion of state do-not-call participants. This means thousands of consumers in these states, who did not specifically request MCI not *to* call them, were nevertheless denied information on a new competitive choice for local phone service

THE EFFECTIVENESS OF THE CURRENT COMPANY-SPECIFIC LISTS IN PREVENTING UNWANTED CALLS

8. Reasonable alternatives to a national do-not-call database already exist today to allow consumer to stop unwanted telephone solicitations. Current federal rules and private industry practice provide consumers with effective means to reduce unwanted telemarketing calls. The most effective is the company-specific do-not-call list mandated by the Federal Communications Commission (FCC) pursuant to **the** Telephone Consumer Protection Act (TCPA). The telephone numbers of individuals who do not want to be called by MCI are kept on the company-specific suppression list and are excluded from MCI's marketing campaigns. Enforcement actions can be **taken** against companies that violate the FCC's rules. MCI recognizes the significance of that potential. Accordingly, MCI provides thorough, annual training to its telemarketers on compliance with do-not-call regulations and company policies and maintains a written policy as required by the TCPA.

9. In addition to being mandated, the company-specific do-not-call list is an important component of the telemarketing infrastructure. It is *not* in MCI's interest, and is a waste of valuable resources, to call those consumers who have advised us that they don't want to hear from MCI specifically. **As** such, MCI not only honors verbal do-not-

call requests made by a consumer doing a sales call, consumers can place their names and numbers on MCI's do-not-call list by emailing MCI's Customer Service or by calling Customer Service via a toll free number.

10. In contrast, participation in a national or state do-not-call list does not necessarily mean that the consumer would not respond favorably to a sales call from MCI in particular. A consumer may be interested in offers of lower telephone rates, but not credit card offers, insurance plans or lawn mowing services. The consumer may also enroll in a state or national do-not-call list as an initial reaction to a particularly unpleasant call by one company.

11. Experience in the states also demonstrates that company-specific "do-not-call" requests can be honored in a more timely fashion than requests to be placed on state "do-not-call" lists. lt can be months from when the consumer signs-up for the state do-not-call list to the time of required compliance by companies governed by such lists. Company-specific requests can be honored far more quickly. Do-not-call requests made to directly to MCI are implemented in at most two weeks, and often within twenty-four hours

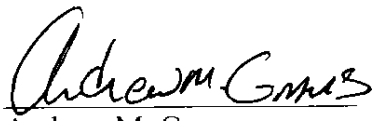
12. Company-specific lists makes sense because they allow consumers to tailor the calls that they are willing to receive. while not to preventing calls that may be of interest *to* them. While not all consumers like receiving telemarketing calls at what may be inconvenient times, generally consumers find it an easy way to take advantage of new cost-saving offers of which they might not have otherwise been aware.

CONCLUSION

13. This concludes my declaration on behalf of WorldCom, Inc.

I declare that the forgoing is true and correct to the best of my information and belief.

Executed on December 6 ,*2002*.



Andrew M. Graves